Q&A with Professor Colton Fehr: R v Hills and the Constitutionality of Mandatory Minimums

In this Q&A session, CCS summer student Anisa Hussain talks to Professor Colton Fehr (Thompson Rivers University, Faculty of Law) about the Supreme Court's recent decision in *R v Hills*, a case concerning the constitutionality of a mandatory minimum under section 12 of the *Charter* (the *Charter*'s prohibition on "cruel and unusual" punishment).

Q: Could you briefly explain the legal claim that was recently addressed by the Supreme Court of Canada (SCC) in *R v Hills*?

A: The offender (Mr Hills) was convicted of discharging a firearm at a residence contrary to section 244.2(1)(a) of the *Criminal Code of Canada*, RSC 1985, c C-46. At the time of the offence, a mandatory minimum sentence of four years imprisonment was in place. Notably, these minimums and those at issue in the companion case of *R v Hilbach* were repealed prior to the Supreme Court hearings. The Court nevertheless considered the merits of the challenges given the Alberta Court of Appeal's decision below, which fundamentally challenged the basic structure of section 12 of the *Charter*: the prohibition against subjecting anyone to cruel and unusual treatment or punishment.

The Supreme Court, Justice Côté dissenting, decided that the impugned mandatory minimum sentences violated section 12 of the *Charter*. According to longstanding jurisprudence, a mandatory minimum sentence will be found unconstitutional if the punishment is "grossly disproportionate" when compared to the appropriate punishment in a real or a "reasonable hypothetical" case. Relying upon a hypothetical scenario, the Court found that a variety of weapons meeting the definition of a "firearm" could not perforate the wall of a typical residence. It followed, the majority concluded, that a person firing a paintball gun at a residence would be subjected to a lengthy prison term under the law — a result that, in its opinion, violated section 12 of the *Charter*. Given this factual finding, it would be surprising if any jurisdiction even considered imposing a custodial sentence for such a hypothetical offender, let alone a lengthy penitentiary sentence.

Q: Why did the SCC criticize and overrule the Alberta Court of Appeal's decision in *Hills*?

A: The most contentious decisions at the Alberta Court of Appeal were written by Justices Wakeling and O'Ferrall. While these decisions were quite nuanced, and prolifically written, they effectively denied core elements of the Supreme Court's jurisprudence under section 12 of the *Charter*. The precise wording of that provision states that "[e]veryone has the right not to be subjected to any cruel and unusual punishment or treatment." In its critique, the Alberta Court of Appeal seized upon two words in this provision.

First, the Justices contended that the conjunction "and" meant that a punishment or treatment must be *both* cruel and unusual to violate section 12. As something like a prison sentence is not "unusual," they maintained, a mandatory minimum sentence could never violate the *Charter*. Second, and alternatively, the Justices maintained that the word "subjected" meant that the person pleading that a mandatory minimum sentence is unconstitutional must actually be the subject of the unconstitutional punishment. If true, then it would not be possible to rely upon "reasonable hypothetical" scenarios in challenging the law. While a less extreme option than the first, this argument would require that the individual challenging a mandatory minimum sentence actually be liable to a grossly disproportionate punishment.

At the heart of the Alberta Court of Appeal's arguments was a general distaste for interfering with Parliament's decisions on the appropriate sentences for crimes. In jurisdictions where similar constraints are not in place, such as the United States, it is common for penalties to be significantly higher than in Canada. The Supreme Court nevertheless provided two general responses. Doctrinally, it observed that both its generous interpretation of the word "subjected" as permitting reliance upon reasonable hypotheticals and its interpretation of the phrase "cruel and unusual" as the expression of a single norm were long accepted in the *Charter* jurisprudence, even if similar wording in section 2(b) of the *Canadian Bill of Rights* resulted in adoption of the narrower interpretations supported by the Alberta Court of Appeal. As the Court held in *R v Henry*, compelling reasons are required before the Court would abandon a precedent with a diminishing impact on rights.

The Court also rejected the Alberta Court of Appeal's proposed overhaul of the section 12 jurisprudence for normative reasons. As Justice Martin observes for the majority, abandoning reasonable hypotheticals "would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order." The fact that it is the

"nature of the law" at issue in a constitutional challenge — not the rights claimant's status — makes it sufficient "for a claimant to allege unconstitutional effects in their case or on third parties." "If the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely." For these reasons, Justice Martin agreed with my prior work that the broader reading of section 12 "is more likely to further the purpose of the *Charter*: protecting citizens from abuse of state power."

Q: Given the risk of disproportionality, and the risk of exacerbating inequities in the justice system, why is the use of mandatory minimums ever constitutionally permissible?

A: The answer to this question derives from the wording of section 12 of the *Charter*. The prohibition prevents "cruel and unusual punishment or treatment." This is an exacting standard, and one that the Supreme Court reasonably concluded requires *grossly* disproportionate conduct. As the Court observes in *Hills*, it has elsewhere described this standard as prohibiting only punishments or treatments that "outrage standards of decency," are "abhorrent or intolerable," or "shock the conscience." Given this high bar, there cannot be a requirement that Parliament impose a "proportionate" or "fit" sentence in all circumstances. Instead, Parliament will sometimes place emphasis on denunciation and deterrence in an effort to respond to what it thinks are improper uses of judicial discretion in crafting sentence ranges with respect to various offences. Parliament no doubt does so in response to public cries to be "tough on crime," a tactic that can be politically prosperous for parties pressing to protect or procure political power (alliteration intended).

This can lead to devastating impacts on criminal defendants, especially Indigenous people and members of other minority groups who are subjected to the criminal law at an unjust rate. This issue arose in *R v Sharma*, which was decided just two months before *Hills*. In *Sharma*, a narrow majority rejected a constitutional challenge to laws limiting who could receive a conditional sentence order, effectively a "jail in the community" sentence. While not so obvious to some of the judges on the Court, it seems intuitive that a provision of this sort will result in many more members of minority groups serving time in prisons. The main argument put forward was that such a result violates section 15 of the *Charter* — the equality rights section — due to its adverse effects on Indigenous people in particular. Yet, this argument is difficult to accept as a matter of constitutional interpretation as it effectively circumvents the deferential punishment standard provided for in section 12 of the *Charter*. For my broader views on this tension, your readers may be interested in my recent article "Reflections on the Supreme Court of Canada's Decision in *R. v. Sharma*" (2023) 60 Alberta Law Review 933.

I raise *Sharma* tangentially so as to provide context for what I think is another positive aspect of the *Hills* case. Faced with a distasteful argument that Indigeneity is irrelevant to crafting a "reasonable hypothetical offender," Justice Martin relied upon past jurisprudence considering the sorts of personal characteristics with which a hypothetical offender may be imbued under section 12 analysis and held that Indigeneity should be a common feature of any such offender. This is a positive development for two reasons. First, it ensures that the history of colonialism will feature strongly in determining what punishments are too severe to pass constitutional muster. As this history tends to militate in favour of using a more rehabilitative lens when sentencing an offender, it can be expected to place downward pressure on what punishments will be unconstitutionally severe. Second, it allows equality as a value to impact the scope of criminal justice rights. Scholars have long lamented the criminal law's failure to incorporate equality into its reasoning, and the majority should be commended, in my estimation, for pushing that project forward.

Q: Mandatory minimums run a high risk of imposing disproportionate sentences on offenders. Aside from striking them down on constitutional grounds, as the Court did in *Hills*, are there other ways in which the disproportionate effects of mandatory minimums might be mitigated?

A: Courts have been asked by Crown attorneys to consider several other means for circumventing mandatory minimum punishments that operate in an unconstitutional manner. The first of these options assumes that such punishments will rarely if ever occur because prosecutors will exercise their discretion in a quasi-judicial manner, thereby avoiding such effects in practice. While prosecutors no doubt will at times allow an accused to plead to lesser offences with an agreed upon sentence to avoid the harshness of a mandatory minimum sentence, relying upon prosecutorial discretion is not a cure for an unconstitutional mandatory minimum sentence. As the Supreme Court explained in *R v Smith* (1987), such an approach ignores the language of section 52 of the *Constitution Act 1982*, which requires that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The Court in *R v Nur* further observed that such an approach would conflate the appropriate roles of courts and prosecutors. Put differently, it "would result in replacing a public hearing on the constitutionality of [a law] before an independent and impartial court with the discretionary decision of a Crown prosecutor, who is in an adversarial role to the accused."

Courts have also been asked to carve out judicially constructed constitutional exemptions to

avoid striking down a mandatory minimum sentence because it applies unconstitutionally in some narrow case. In *R v Ferguson* (2008), the Supreme Court rejected this option. As Chief Justice McLachlin observed, "[t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice." Building on this reasoning in *Nur*, Chief Justice McLachlin suggested that constitutional exemptions deprive "citizens of the right to know what the law is in advance and to govern their conduct accordingly, and … encourage … the uneven and unequal application of the law." For Chief Justice McLachlin, "bad law, fixed up on a case-by-case basis by prosecutors, does not accord with the role and responsibility of Parliament to enact constitutional laws for the people of Canada."

But this does not mean that a similar approach could not be adopted via legislation. The best proposal the Supreme Court has offered is to adopt a "safety valve" clause that allows courts to impose a lesser sentence after demonstrating that imposition of a mandatory minimum sentence would result in an unconstitutionally severe punishment. I suspect some politicians would be apprehensive about this approach, but it arguably strikes the best middle ground as it would avoid the need to consider any real or reasonable hypothetical case when considering a mandatory minimum sentence's constitutionality under section 12 of the *Charter*. If such a case arose, the Court would simply employ the safety valve exception to impose a fit sentence.

Thanks for reading!